Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

October Term, 1998

JAMES A. STEWART,

Petitioner,

vs.

VANESSA L. STEWART,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of North Carolina

PETITION FOR A WRIT OF CERTIORARI

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31 pp

Questions Presented for Review

North Carolina statute, G.S. 1-75.8, states in pertinent part that:

> A court of this state having jurisdiction over the subject matter may exercise jurisdiction *in rem* . . . (3) [w]hen the action is for a divorce or annulment of a resident of this State.

In reliance upon this statute, the courts of North Carolina asserted jurisdiction over the Petitioner and dissolved his marriage to Respondent although Petitioner is a resident of Pennsylvania, without any contacts with North Carolina, and the marriage was celebrated in Pennsylvania, where the Petitioner and Respondent had their marital domicil until Respondent fled the marital home.

The questions thus presented are:

1. Whether the trial court's denial of Petitioner's motion under N.C.R.Civ.P. 12(b)(2) to dismiss for lack of personal jurisdiction on the grounds that the Petitioner did not have the requisite "minimum contacts" with North Carolina and thus, the trial court's assertion of jurisdiction in this matter contravened the Petitioner's Constitutional rights under the Fourteenth Amendment to the United States Constitution.

2. Whether the trial court's granting of Respondent's motion for summary judgment divorce contravened the Petitioner's Constitutional rights under the Fourteenth Amendment to the United States Constitution as the Petitioner did not have the requisite "minimum contacts" with North Carolina and thus, the courts of the State of North Carolina did not have jurisdiction over the Petitioner, his marital status or the parties' marriage.

3. The North Carolina Court of Appeal's dismissal of Petitioner's immediate appeal from the trial court's denial of Petitioner's motion to dismiss was improper,

and has denied Petitioner due process of law, as the trial court Order was set forth in the Transcript of October 8, 1996 filed with the Court of Appeal and because Petitioner was never provided with any other form of Order.

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Opinions Below

The trial court judge, the Hon. H. Paul McCoy, Jr., denied Petitioner's motion to dismiss on October 8, 1996. No Order has ever been received, although it is set forth on page 8 of the Transcript of the October 8, 1996 proceeding which was filed with the North Carolina Court of Appeals. See App. 16-17. The North Carolina Court of Appeals dismissed Petitioner's appeal from the trial court's October 8, 1996 ruling as interlocutory by Order of March 14, 1997. See App. 9.

Respondent filed a motion for summary judgment for absolute divorce, which was granted by the trial court on April 21, 1997. See App. 6. Petitioner filed a Notice of Appeal from the trial court rulings on May 7, 1997. The Court of Appeals of North Carolina issued an opinion in this case. See App. 1. The opinion has not been reported. The Supreme Court of North Carolina refused to hear Petitioner's appeal from the Court of Appeals decision. See App. 4.

Statement of Jurisdiction

The Order of the Supreme Court of North Carolina of May 7, 1998, filed on May 12, 1998, dismissed Petitioner's appeal from the North Carolina Court of Appeals Opinion of March 3, 1998 and denied Petitioner's petition for discretionary review. The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1257(a).

Constitutional Provisions and Statutes Involved

This case involves North Carolina statute, G.S. 1-75.8, which states in pertinent part:

> A court of this state having jurisdiction over the subject matter may exercise jurisdiction *in rem* . . . (3) [w]hen the action is for a divorce or annulment of a resident of this State.

This case also involves Section 1 of the Fourteenth Amendment to the Constitution of the United States. Said section reads as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny any person within its jurisdiction the equal protection of the laws.

Statement of Case

On or about June 19, 1996, Respondent, Vanessa L. Stewart, filed a Complaint for Divorce in the District Court of Halifax County, North Carolina. By letter dated June 25, 1996 from Plaintiff's attorney, Ronnie Reaves, Petitioner, James A. Stewart, received a Civil Summons and copy of the Complaint.

Following the granting of extensions of time, on or about September 23, 1996, Petitioner, through then-counsel, Paul T. Cleavenger, filed a motion to dismiss the Complaint pursuant to Rule 12(b)(1), (2), (3) and (6). Following a hearing conducted on October 8, 1996, before the Hon. H. Paul McCoy, Jr., Petitioner's motion to dismiss was denied. No Order has ever been received, although it is set forth on page 8 of the Transcript of the October 8, 1996 proceeding which was filed with the North Carolina Court of Appeals. See App. 16-17. Petitioner immediately filed an appeal from the denial of the motion to dismiss for lack of jurisdiction which was dismissed as interlocutory by order of March 14, 1997. See App. 9.

Respondent filed a motion for summary judgment for absolute divorce, which was granted by the trial court on

April 21, 1997. See App. 6. Petitioner filed a Notice of Appeal from the trial court rulings on May 7, 1997. In its Opinion of March 3, 1998, the North Carolina Court of Appeals dismissed that portion of Petitioner's appeal as pertained to the trial court's denial of the motion to dismiss and denied Petitioner's appeal from the trial court's Order of Summary Judgment. See App. 1.

Petitioner filed a Notice of Appeal Presenting Constitutional Question and Petition for Discretionary Review with the Supreme Court of North Carolina on March 3, 1998, seeking review and reversal of the decision of the North Carolina Court of Appeals pursuant to G.S. 7A-30 and 7A-31. Petitioner's application was, dismissed and denied by Order of the Supreme Court of North Carolina on May 7, 1998. See App. 4.

Reasons for Granting Writ

This case involves application of the "minimum contacts" jurisdictional test to a divorce proceeding commenced in North Carolina against a non-resident spouse. The North Carolina Court of Appeals relied upon that court's decision in *Chamberlain v. Chamberlain*, 319 S.E.2d 670 (NC App. 1984), cert. denied 323 S.E.2d 921 (1985), holding that jurisdiction over a marriage exists simply because one party to the marriage takes up residence in North Carolina solely for the purpose of obtaining a divorce. This decision is at odds with the United States Supreme Court decision in *Shaffer v. Heitner*, 433 U.S. 186 (1977), which held that the "minimum contacts" test of *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), also controlled *in rem* and *quasi in rem* actions. In *Burnham v. Superior Court of Cal., Marin County*, 495 U.S. 604, 621 (1989), the United States Supreme Court summarized the holding in *Shaffer* as, "*quasi in rem* jurisdiction, that fictional 'ancient form,' and *in personam* jurisdiction, are really one and the same and must be treated alike."

The Fourteenth Amendment of the United States Constitution guarantees to all citizens due process and equal protection under the law. Among other things, the Fourteenth Amendment has been determined to limit "the power of a state court to render a valid personal judgment against a nonresident defendant." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980).

Until the decision in *Williams v. North Carolina*, 317 U.S. 287 (1942), divorce had always been deemed a "personal" matter, not a matter of status. This issue was thoroughly considered by the United States Supreme Court in *Haddock v. Haddock*, 201 U.S. 562 (1905). In *Haddock*, the Court fully considered the consequences that would follow if marriage was treated as a transitive status for the purpose of conferring jurisdiction in divorce actions:

> It is urged that the suit for divorce was a proceeding *in rem*, and, therefore, the Connecticut court had complete jurisdiction to enter a decree as to the *res*, entitled to be enforced in the State of New York. But here again the argument is contradictory. It rests upon the theory that jurisdiction in Connecticut depended upon the domicil of the person there suing and yet attributes to the decree resting upon the domicil of one of the parties alone a force and effect based upon the theory that a thing within the jurisdiction of Connecticut was the subject matter of the controversy. But putting this contradiction aside, what, may we ask, was the *res* in Connecticut? Certainly it cannot in reason be said that it was the cause of action or the mere presence of the person of the plaintiff within the jurisdiction. The only possible theory then upon which the proposition proceeds must be that the *res* in Connecticut, from which the jurisdiction is assumed to have arisen, was the marriage relation. But as the marriage was celebrated in New York between citizens of that State, it must be admitted,

> under the hypothesis stated, that before the husband deserted the wife in New York, the *res* was in New York and not in Connecticut. As the husband, wrongfully abandoning the wife in New York, never established a matrimonial domicil in Connecticut, **it cannot be said that he took with him the marital relation from which he fled to Connecticut**. Conceding, however, that he took with him to Connecticut so much of the marital relation as concerned his individual status, it cannot in reason be said that he did not leave in New York so much of the relation has pertained to the status of his wife. From any point of view, then, under the proposition referred to, if the marriage relation be treated as the *res*, it follows that it was divisible, and therefore there was a *res* in the State of New York and one in the State of Connecticut. Thus considered, it is clear that the power of one State did not extend to affect the thing situated in another State. *Id* at 576-77[1]. (emphasis supplied).

The practical consequences of the ruling of the North Carolina Court of Appeal were foreseen by Justice Jackson in his dissenting opinion in *Williams v. North Carolina*, 317 U.S. 269, 311 (1942):

> I cannot join in exerting the judicial power of the Federal Government to compel the State of North Carolina to subordinate its own law to the Nevada divorce decrees. It subjects matrimonial laws of each state to important limitations and exceptions that it must recognize within its own borders and as to its own permanent population. **It nullifies the power of each state to protect its own citizens**

---

[1] This discussion is easily adapted to the case at hand by simply substituting "husband" for "wife," and vice versa, and substituting for "Connecticut" and "New York", respectively, the States of North Carolina and Pennsylvania.

against dissolution of their marriages by the courts of other states which have an easier system of divorce.

The result of this Court's decision in *Williams v. North Carolina* has been to open the floodgates of easy divorce. This is exactly the result that Justice Jackson foresaw almost fifty-seven years ago. As predicted by Justice Jackson, the consequences of the *Williams* decision has been disastrous to the marriage relationships in this country. Justice Jackson also accurately foresaw the futility of a non-resident spouse in a foreign divorce proceeding. It is difficult to imagine how such futility can comport with "traditional notions of fair play and substantial justice." I can think of nothing more unfair or unjust.

The rulings of the North Carolina courts in this matter are completely out of step with, and repugnant to, this Court's most recent rulings concerning jurisdiction.

Conclusion

WHEREFORE, Petitioner prays that a Writ of Certiorari issue from this Honorable Court to review the judgment of the Supreme Court of North Carolina in *Stewart v. Stewart*. In the event that the Petition is granted, Petitioner prays that the judgment of the Court below be reversed.

Respectfully submitted,

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a1

NO. COA97-960

NORTH CAROLINA COURT OF APPEALS

Filed: 3 March 1998

Halifax County
No. 96 CVD 670

VANESSA L. STEWART,

Plaintiff,

v.

JAMES A. STEWART,

Defendant.

Appeal by defendant from order rendered 8 October 1996 and judgment filed 21 April 1997 by Judge H. Paul McKoy, Jr. in Halifax County District Court. Heard in the Court of Appeals 24 February 1998.

Ronnie C. Reaves, P. A., by Lynn Pierce, for plaintiff appellee.

James A. Stewart, defendant appellant, pro se.

GREENE, Judge.

James A. Stewart (Defendant) appeals from the trial court's denial of his motion to dismiss for lack of personal jurisdiction and improper venue, and from the trial court's grant of summary judgment for Vanessa L. Stewart (Plaintiff).

Plaintiff and Defendant were married on 3 March 1990 in Cumberland County, Pennsylvania. The parties separated on 19 June 1995. On 19 June 1996, Plaintiff filed a "Complaint for Divorce" in Halifax County, North Carolina, alleging that she had been a resident of North Carolina for at least six months. Defendant, who continued to reside in Pennsylvania,

subsequently filed a motion to dismiss Plaintiff's action pursuant to Rules 12(b)(1), (2), (3), and (6) of the North Carolina Rules of Civil Procedure. The trial court denied Defendant's motion in open court on 8 October 1996. Defendant's appeal from the denial of his motion to dismiss was dismissed as interlocutory by order of this Court on 14 March 1997.

Plaintiff filed a motion for summary judgment on her claim for absolute divorce. On 21 April 1997, the trial court granted Plaintiff's motion and, pursuant to N.C. Gen. Stat. § 50-6, ordered that the parties' marriage be dissolved.

The issues are whether: (I) the trial court erred by denying Defendant's motion to dismiss for lack of personal jurisdiction and improper venue; and (II) the trial court had jurisdiction to grant Plaintiff's motion for summary judgment.

I.

"[A]n order is entered 'when it is reduced to writing, signed by the judge, and filed with the clerk of court.' " *Abels v. Renfro Corporation*, --- N.C. App. ---, ---, 486 S.E.2d 735, 738 (quoting N.C.G.S. § 1A-1, Rule 58 (Supp. 1966), *disc. review denied*, 347 N.C. 263, 493 S.E.2d 450 (1997)). "[T]his Court will dismiss an appeal if the judgment or order does not appear in the record on appeal." *Id.* It is the responsibility of the appellant to ensure that the record on appeal is complete. *State v. Alston*, 307 N.C. 321, 341, 298 S.E.2d 631, 644 (1983).

In this case, the record contains no written order denying Defendant's motion entered by the trial court. Defendant, as the appellant, had the responsibility to include all documents necessary to his appeal in the record. Defendant's appeal from the denial of his motion to dismiss is therefore dismissed.

II

Defendant also asserts that the trial court erred by granting summary judgment because he lacks the requisite minimum contacts with North Carolina for the trial court to assert jurisdiction over his person, his marital status, or the parties' marriage. Defendant's argument has been addressed and rejected by this Court in *Chamberlin v. Chamberlin*, 70 N. C. App. 474 , 319 S.E.2d 670, *disc. review denied*, 312 N.C. 621, 323 S.E.2d 921 (1984). *In Chamberlin*, the Court concluded that the six-month residency requirement under this State's divorce law, *see* N.C.G.S. § 50-6 (1995), conferred the necessary jurisdiction to adjudicate the dissolution of a marriage between a resident plaintiff and a nonresident defendant.

In this case, Plaintiff has met the statutory residency requirement; therefore, the trial court had proper jurisdiction to enter summary judgment.

Affirmed.

Judges MARTIN, Mark D. and SMITH concur.

Report per Rule 30(e).

A TRUE COPY
CLERK OF THE COURT OF APPEALS

BY /S/_____
DEPUTY CLERK
3-3-1998

NO. 90P98 SIX-A-DISTRICT

SUPREME COURT OF NORTH CAROLINA

From NC Court of Appeals
(COA97-960)
From Halifax
(96CVD670)

VANESSA L. STEWART

v.

JAMES A. STEWART

ORDER

Upon consideration of the notice of appeal from the North Carolina Court of Appeals, filed by Defendant in this matter pursuant to G.S. 7A-30 (substantial constitutional question), the following order was entered and is hereby certified to the North Carolina Court of Appeals: the notice of appeal is

"Dismissed by order of the Court in conference, this the 7th day of May 1998.

s/ Orr, J.
For the Court"

Upon consideration of the petition filed by Defendant in this matter for discretionary review of the decision of the North Caorline Court of Appeals pursuant to G.S. 7A-31, the following order was entered and is hereby certified to the North Caroline Court of Appeals:

"Denied by order of the Court in conference, this the 7th day of May 1998.

s/ Orr, J.
For the Court"

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 12th day of May 1998.

Christie Speir Cameron
Clerk, Supreme Court of
North Carolina
/s/
Carol B. Templeton
Assistant Clerk .

Copy to:
North Carolina Court of Appeals
Mr. James A Stewart
Mr. Ronnie C. Reaves, Attorney at Law,
For Vanessa Stewart
Mr. Ralph A White, Appellate Court Reporter
West Publishing Company
Lexis-Nexis
Shephard's McGraw-Hill

a6

96 CVD 670

FILED

HALIFAX COUNTY, C.S.C.
BY: /s/_____

NORTH CAROLINA
HALI FAX COUNTY

IN THE GENERAL COURT OF JUSTICE
DISTRICT COURT DIVISION

VANESSA L. STEWART,

Plaintiff

vs.

JAMES A STEWART,

Defendant

JUDGMENT OF DIVORCE FROM THE BONDS OF MATRIMONY

THIS CAUSE, coming on to be heard and being heard before the undersigned presiding upon Plaintiff Motion for Summary Judgment pursuant to Rule 56 of the North Carolina Rules of Civil Procedure and for a ruling thereon.

Having reviewed the Motion and the other documents of record, which include Plaintiff's verified Complaint for Divorce from the Bonds of Matrimony, the Court determines that no genuine issue of material fact remains for trial by jury

or judge sitting without a jury. Accordingly, the Court makes the foregoing

FINDINGS OF FACT:

1.

Plaintiff filed a verified Complaint for Divorce from the Bonds of Matrimony as appears of record. Defendant was duly served a copy of the Summons and Complaint as appears of record. Defendant has not filed an answer or other responsive pleading and the time for filing such answer or other pleading has expired.

2.

That Plaintiff is and has been a citizen and resident of Wake County, North Carolina, for at least six months next preceding the filing and institution of this action.

3.

That Plaintiff and Defendant were married on or about March 3, 1990 in Cumberland County, Pennsylvania.

4.

The marital relationship was terminated on or about June 19, 1995, when the parties commenced to live separate and apart from one another and since said time, the parties have live continuously separate and apart without resuming the marital relationship. That at the time of the separation of the parties, it was the intent of the parties to live separate and apart and terminate the marital relationship which existed between them.

5.

That the following is a list of the names and dates of birth of any children born of the marriage of the parties: none.

6.

That Plaintiff desires to be returned to her maiden name of Vanessa L. Tate.

BASED UPON THE FOREGOING FINDINGS OF FACT, the Court **CONCLUDES AS A MATTER OF LAW** that it has jurisdiction over the subject matter of this action and the parties to this action; that this matter is properly before the Court for hearing and trial; that Plaintiff is entitled to an absolute divorce from the bonds of Matrimony from Defendant on the ground of continuous separation for more than one year pursuant to NCGS 50-6; and there remains no genuine issue of material fact to be resolved by a jury or judge sitting without a jury.

NOW, THEREFORE, IT IS HEREBY ORDERED that Plaintiff's Motion For Summary Judgment be, and the same hereby is, granted. **IT IS FURTHER ORDERED**, pursuant to N.C.G.S. 50-6, that the marriage heretofore existing between Plaintiff, VANESSA L. STEWAFRT, and Defendant, JAMES A STEWART, be and the same hereby is dissolved; that Plaintiff, VANESSA L. STEWART, and Defendant, JAMES A STEWART, are divorced from the bonds of matrimony; and that Plaintiff VANESSA L. STEWART be returned to her maiden name of Vanessa L. Tate.

This the 21ST day of April, 1997.

/s/ H. Paul
JUDGE PRESIDING

No. COA97-122

North Carolina Court of Appeals

FILED
97 MAR 14, PM 2:50

From Halitax
(96 CVD470)

VANESSA L. STEWART,

Plaintiff,

v.

JAMES A. STEWART,

Defendant.

ORDER

The following order was entered:

The motion filed in this cause on the 26th day of February 1997 and designated "Plaintiff-Appellee's Motion to Dismiss Appeal" is allowed. Appeal dismissed. Appellant to pay costs.

By order of the Court this the 14th day of March 1997.

And it is considered and adjudged further, that the APPELLANT DO PAY the costs of the appeal in this Court incurred, to wit, the sum of NINE AND NO/100 dollars ($9.00), and execution issue therefore.

The above order is therefore certified to the Clerk of District Court Halifax County.

Witness my hand and official seal this the 14th day of March 1997.

/s/
John H. Connell
Clerk of North Carolina Court of Appeals

orig CSC
cc:
Mr. Ronnie Reaves
Ms. Lynn Pierce
Mr. James A. Stewart

A TRUE COPY
CLERK OF THE COURT OF APPEALS
OF NORTH CAROLINA
BY /s/
DEPUTY CLERK
3-14-1997

STATE OF NORTH CAROLINA
COUNTY OF HALIFAX

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO. 96CVD670

VANESSA L. STEWART,

Plaintiff

vs.

JAMES A. STEWART,

Defendant

TRANSCRIPT

The above-captioned case coming on for hearing at the October 7, 1996, Civil Session of the District Court of Halifax County, Halifax, North Carolina, before the Honorable H. Paul McCoy, Jr., Judge Presiding, the following proceedings were had, to wit:

APPEARANCES

For the Plaintiff:	Mrs. Lynn Pierce Attorney at Law P. O. Drawer 587 Weldon, North Carolina 27890
For the Defendant:	Mr. Paul T. Cleavenger Attorney at Law P. O. Box 1572 Kinston, North Carolina 28503
Tuesday, October 8, 1996	Recorded by: Clerk of Superior Court Halifax County

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(October 8, 1996, Tuesday)

JUDGE MCCOY: Stewart v. Stewart - 96CVD670

Since it's your motion, I'll allow you to proceed, Mr. Cleavenger whenever you're ready.

MR. CLEAVENGER: Your Honor, our motion in this matter goes to several different points and I will go with the 12(b)(3) first, and ask the Court to address that aspect of it. This is the issue of improper venue. Our contention is, is that under 50-3 of the North Carolina General Statute, the Code says, "In all proceedings for divorce, the summons shall be returnable to the court of the county in which either the plaintiff or defendant resides." We would contend that based upon the evidence that has been presented in the Verified Complaint as well as the response to defendant's motion, that the plaintiff, Vanessa Stewart, is in fact a resident of Wake County and that this matter should either be dismissed or in the alternative that this Court should remove the matter to Wake County for hearing.

Will you like for me to proceed or do you care to rule on that at this point, Your Honor?

THE COURT: The only other thing I would ask you about is, is your moving for a change of venue based on the fact that the plaintiff, Mrs. Stewart, resides in Wake County, not in Halifax County? The defendant, Mr. Stewart, as I understand it currently resides or has at all times resided in the State of Pennsylvania since this action was filed?

MR. CLEAVENGER: That's correct, Your Honor.

THE COURT: Okay. Let me ask Mrs. Pierce if she wants to respond to this motion and then we'll move on.

MRS. PIERCE: Yes, sir, Your Honor. It's our position that venue can be waived and she has in effect waived her right to have the venue in the place in which she

resides. We would argue that with regard to Mr. Stewart, since he lives outside of the State, completely has no ties to this State, that this statute really was not designed to address that situation, that this statute is really designed to address the situation where a defendant in this State is required to travel to another county it wants the action removed to, the county in which the defendant lives and, of course, that would be impossible since he lives in Pennsylvania, to have it moved to Pennsylvania. So, Your Honor, we would argue that you have the discretion to keep the venue in this county and we would ask that you deny the defendant's motion.

THE COURT: Okay. What's your next motion, Mr. Cleavenger.

MR. CLEAVENGER: Your Honor, the next motion involves Rule 12(b)(1) lack of subject matter jurisdiction, 12(b)(2) lack of jurisdiction over the person, and 12(b)(6) failure to state a claim for which relief can be granted.

Our contention is, Your Honor, that during the course of the marriage the parties bought a marital residence as tenants by the entirety. As the Court understands tenants by the entirety is that each of the parties owns the entirety of the property, that upon granting the divorce that arrangement would change and the defendant would become a tenant in common with the plaintiff and he would be entitled to an undivided one half interest in the property.

Essentially what has happened by the entry of the divorce is, is that a significant property right is being affected and the property exists in Pennsylvania, but the Complaint, the plaintiff's Complaint does not address the property right but in fact the property right of the defendant is being materially and substantially impaired by entry of this. We would contend that this Court does not have subject matter jurisdiction over the property in Pennsylvania as well as the Complaint does not put before the Court the property in Pennsylvania such that the Court can address that issue.

The second is, is that because the property is in Pennsylvania, there has not been a minimum contact showing that this Court has personal jurisdiction over the defendant. And we would argue that the Court must first obtain personal jurisdiction over the defendant in order to deal with the divorce.

The third aspect of it is, is that they have failed to state a claim for which relief can be granted. In fact they've failed to state a claim period regarding the change of interest that my client is going to suffer as a result of this divorce here in North Carolina though he has never resided here. And while we understand, and plaintiff's counsel is correct in her response, that the United States Supreme Court has treated matters of matrimony as in rem jurisdiction and entitled that status, that the fact that they have marital property and that martial property is tied directly or that my client's interest in that martial property is tied directly to his matrimonial status changes it from an in rem jurisdiction to an ingression jurisdiction and we would contend that the Court must address that. For that reason we would say that divorce should not be allowed and that plaintiff's Complaint should be dismissed.

MRS. PIERCE: Judge, I can understand their argument if we had been asking for equitable distribution, Your Honor, but this is an uncontested divorce in that she is waiving any right to alimony or equitable distribution. I indicated earlier that she would be willing to sign over any property to Mr. Stewart if he would be willing to cooperate to that end.

Your Honor, I would argue that all we need is in rem jurisdiction and that the fact that there might be marital property in another state is not going to be a barrier to her getting a divorce in this State.

THE COURT: Okay.

This matter coming on to be heard and being heard before the undersigned Judge at the October the 8th, 1996

Session of Halifax County Civil District Court upon the defendant's motion under Rule 12(b)(1), 12(b)(2), 12(b)(3), and 12(b)(6), and the Court makes the following

FINDINGS OF FACT:

That the plaintiff is a resident of Wake County, North Carolina and has been a resident of the State of North Carolina for at least six months preceding the commencement of this action for divorce;

That the defendant currently resides in the State of Pennsylvania;

That the plaintiff and defendant were lawfully married in Cumberland County, Pennsylvania and lived there until the time of their separation on June 19th, 1995.

That the defendant was served with a copy of the Summons and Complaint by Certified Mail, the date of delivery having been July the 2nd, 1996 and the Affidavit of the plaintiff with the return receipt attached indicates that the Summons was received by the plaintiff as his signature is on the Certified Mail receipt.

That the defendant has not filed an answer to the Complaint, but has made a personal appearance in this action through his attorney, Paul Cleavenger of the Lenoir County Bar by the filing of his above-styled motions.

That as to the defendant's motion for a change of venue under Rule 12(b)(3), the Court would find as a fact further that the plaintiff has effectively waived her right to venue by filing her action in Halifax County, North Carolina.

That N.C.G.S. 50-3 indicates that if the defendant raises the issue of venue, then the Court should transfer the case to the county where the defendant lives, assuming the defendant lives within the jurisdiction of the State of North Carolina, who in this case the defendant resides in the State of Pennsylvania and the Court would be unable to make a transfer of the venue of this case to the county where the

defendant resides since he does not reside within the jurisdiction of the State of North Carolina.

That as to the motions of the defendant under Rule12(b)(1) for lack of subject matter jurisdiction and 12(b)(2) for lack of personal jurisdiction over the defendant, the Court would further find as a fact that in matters of matrimony in rem jurisdiction is sufficient for the Court to proceed and the Court does have in rem jurisdiction to enter orders regarding the dissolution of the marriage in this matter.

As to the defendant's contention that his property rights would be -- his real property rights in the State of Pennsylvania would be adversely affected by the decision to grant the divorce in North Carolina, the Court would further find as a fact that the plaintiff has not in her Complaint asserted a claim for alimony or equitable distribution of marital property so that the defendant's allegation that his property rights would be adversely affected by ruling of divorce in this State is without merit.

As to the defendant's motion under Rule 12(b)(6) for failure of the plaintiff to state a claim upon which relief can be granted, the Court finds that this motion is frivolous and has no basis in fact or law.

Based on the foregoing findings of fact the COURT CONCLUDES that the defendant's motion for a change of venue under Rule 12(b)(3) should be denied; that his motion for dismissal based on lack of subject matter jurisdiction under Rule 12(b)(1) and his motion for dismissal based on the lack of jurisdiction over the person under Rule 12(b)(20), and his motion to dismiss for failure to state a claim upon which relief can be granted under Rule 12(b)(6) should also be denied.

NOW, THEREFORE, IT IS ORDERED that the Motions of the defendant under Rule 12(b)(3), Rule 12(b)(1), Rule 12 (b)(2), and Rule 12(b)(6) be and the same are hereby denied and that this matter is retained for hearing of the action for absolute divorce in Halifax County Civil District Court.

This the 8th day of October, 1996.

MR. CLEAVENGER: May we add one more thing, Your Honor, and that is regarding my limited appearance and withdrawal as defense counsel of record.

THE COURT: All right. That would be an additional portion of the Order. It is further ordered that the attorney for the defendant based on his limited representation of the defendant through the hearing on these motions would be hereby relieved of any further obligation to represent the defendant in any action in Halifax County, North Carolina.

MRS, PIERCE: Your Honor, how much time do we have to proceed on the motion for summary judgment? Do we need to wait another thirty days now that this has been entered?

THE COURT: I probably would wait awhile to see if there is an appeal of this motion before you -- the decision just to be on the safe side.

MRS. PIERCE: All right.

MR. CLEAVENGER: Thank you, Your Honor.

THE COURT: Thank you, sir.

CERTIFICATE

STATE OF NORTH CAROLINA

HALIFAX COUNTY

I, Leah M. Letchworth Stanfield, Official Court Reporter, assigned by the Administrative Office of the Courts to report the Criminal and Civil Sessions of the Superior Courts of Halifax County, do hereby certify that the foregoing is a true and accurate transcription to the best of my ability of the taped hearing by the Clerk of Superior Court requested of me by said defendant.

I am in no way certifying to the contents of the tape, only that which I could hear to the best of my ability inasmuch as I did not report said session.

This the 2nd day of December, 1996.

/s/_____

Leah M. Letchworth Stanfield
Official Court Reporter and
Notary Public
6A Judicial District
P.O. Box 359
Halifax, North Carolina 27839
Phone: 919-536-4877

My Commission expires: 9/3/97